

NO. 48643-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

RONALD ALLEN AHLQUIST II, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.14-1-01075-3

CORRECTED BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. This Court should decline review of the appellant's first assignment of error because the appellant failed to preserve this issue for review.**
- II. This Court should find the trial court's failure to enter written findings and conclusions, pursuant to CrR 3.5(c), was harmless.**

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The appellant (hereafter, "defendant") was charged by Second Amended Information with: Count One: Manslaughter in the First Degree, Count Two: Manslaughter in the Second Degree, Count Three: Identity Theft in the Second Degree, Count Four: Identity Theft in the Second Degree, and Count Five: Theft in the First Degree. For Counts One – Five, the State alleged as an aggravating factor that the victim was particularly vulnerable. For Counts One and Two, the State also alleged as an aggravating factor that the defendant demonstrated an egregious lack of remorse. Counts One – Four were also charged as crimes of Domestic Violence. (CP 21-23).

Trial commenced on January 19, 2016. On January 28, 2016, the jury returned verdicts of guilty on Counts One – Four. (CP 94, 97, 100,

103). For Count Five, the jury returned a verdict of guilty on the lesser-included offense of Theft in the Second Degree. (CP 106-07). In addition, the jury found the State proved each charged aggravating factor. (CP 94-109).

The defendant was sentenced on February 23, 2016. (CP 112, 113-21). The trial court sentenced the defendant to 110 months confinement. (CP 112, 116). The trial court vacated Count Two: Manslaughter in the Second Degree. (CP 112). This timely appeal followed.

B. FACTUAL HISTORY

Norman Miller Ahlquist (hereafter, “Norman”) had dementia, most-likely caused by early-onset Alzheimer’s Disease. (RP 469). Norman lived with his son, the defendant, who was also Norman’s self-titled care-giver. (RP 465).

In August of 2009, the Department of Social and Health Services (“DSHS”) conducted an in-home assessment of Norman. (RP 446). The assessment revealed that Norman had long-term memory problems and had recently suffered further memory deterioration (RP 472-73); Norman could not dial 911 on the phone and required extensive assistance with using the phone (RP 466-67); Norman forgot to take his medications and was unaware of dosages (RP 470); Norman made poor decisions and was

unaware of consequences (RP 473); Norman had a history of urinating in the closet, he could not always find the bathroom, and he required physical help in toileting (RP 474-75, 481); Norman needed help to walk in his room, the hallway, and the rest of the house (RP 477); Norman got lost outside his residence (RP 478); Norman could not dress his lower extremities and required assistance in dressing and grooming (RP 480); it was unsafe for Norman to cook (475); Norman forgot to eat and needed to be cued to eat (RP 479); and, Norman was unable to manage his finances. (RP 483).

Based on the in-home assessment, the defendant was advised that his father qualified for State-paid caregiving services. (RP 486). The defendant turned down all assistance offered by DSHS; he told social services that he would take care of his father on his own; and he never completed the necessary classes to become a paid caregiver for his father. (RP 503, 509-10, 545-46, 549, 550).

On October 7, 2013, Norman's dead body was found in the back of the defendant's van. (RP 244, 360). Norman was wrapped in a deflated air mattress. (RP 244-46). There was a garbage bag covering his head and a garbage bag covering his legs. (RP 246). Norman's body was discolored, there was an extreme odor, and there were three stages of fly gestation on his body – all of which indicated he had been dead for several days. (RP

627-30). Norman was wearing nothing but a T-shirt, he had no pants or underwear on. There was feces on his bottom. Norman had overgrown, brown and curled toenails, which were suggestive of a longstanding and untreated foot fungus. (RP 664).

Norman was completely emaciated. (RP 247). He was described by one officer as “skin over bones.” (RP 248). His body weight was determined to be 85 pounds (his prior weight was 130 pounds). (RP 622, 695). The pattern of Normans’ rib cage was fully visible through his skin and it was discovered that there was hardly any fat on his abdominal wall. (RP 658-59, 624).

After conducting an autopsy, Clark County Medical Examiner Dr. Dennis Wickham determined the cause of Norman’s death to be homicide, caused by “malnutrition due to dementia and neglect.” (RP 619-20, 648).

The defendant spoke to three people on the evening of October 7, 2013: Clark County Medical Examiner’s Office investigator Tony Lopez, County Sheriff’s Office Sergeant Anthony Barnes, and Clark County Sheriff’s Office Detective Kevin Harper. (RP 344, 354, 1077). The defendant told them, in the last few months, “it just got out of hand...I don’t know what else to say.” (RP 1100). The defendant said, until recently, his father was “completely self-sufficient;” however, for the past few months, his father never left his room. (RP 1098, 1109). The

defendant said he didn't like to go in his father's room anymore, because his father would just yell at him and he smelled really bad. (RP 1107, 1202). The defendant said he would just stockpile food on a shelf near his father's bed, so he wouldn't have to go in there. (RP 1101). The defendant said he would go for days without seeing his father. (RP 345).

The defendant said the last time he talked to his father was a couple of weeks ago. (RP 1110-11). The defendant said the last time he "saw" his father was three – four weeks ago. (RP 1111). When asked whether his father had eaten any food in the last four weeks, the defendant said "a little bit." (RP 1112). When asked whether his father had eaten any food in the last three weeks, the defendant said "very little." (RP 1112). When asked *what* food his father ate three weeks ago, the defendant said "maybe a half of a banana." (RP 1113). When asked whether his father ate any food two weeks ago, the defendant said "I don't think so." (RP 1113).

When asked if his father was alive within the past week, the defendant said he "thought he was." (RP 1104). The defendant said he did not know anything was wrong until his adolescent son alerted him that there was a really bad smell coming from Grandpa's room. (RP 1114-15). The defendant said, he went in his father's room, he found his father, dead, lying next to his bed, face down, with one leg in his pants. (RP

347). The defendant said he knew his father was dead because he was already decomposing. (RP 348-49). The defendant said he put his father's body in his van because he was planning on taking his father to the coroner's office or a funeral home; however, he had not done so. (RP 344).

A brown stained mattress, which had belonged to Norman, was found leaning against a wall outside the defendant's residence. (RP 264). Inside Norman's former bedroom, officers were met with an overwhelming smell of human decomposition and feces. (RP 390, 1080). There were exposed floorboards on the floor. (RP 391). There were swatches of fresh paint across portions of the walls and portions of the floorboards. (RP 391, 395).

Dr. Derrick Scovel, a licensed clinical psychologist specializing in geriatric psychology, testified that, based on the DSHS assessment in 2009, the medical examiner's report, and the defendant's statements, Norman's condition was consistent with early onset Alzheimer's disease. (RP 903-05). Dr. Scovel explained that Alzheimer's disease is a progressive and predictable neurological disease. (RP 904). Dr. Scovel said Norman's aggressive tendencies, his reclusiveness, and his confusion and forgetfulness were all consistent with the progression of the disease. (RP 882-83, 888-89, 891, 906-08). Dr. Scovel said, for a person with this

condition, it would have been wholly insufficient to leave food on a shelf or to check on him or her once-a-week. (RP 910-11). Dr. Scovel said, by the year 2013, someone with this condition would have forgotten how to eat, he would not have been able to care of himself, and he would have required 24/7 care. (RP 889-90, 910).

Meanwhile, an investigation by the Social Security Administration revealed that Norman received \$865.00 per month in Social Security benefits. (RP 1016). Norman was the sole beneficiary of those benefits. (RP 773). Records showed that, between April and September of 2013, the defendant used a Social Security Administration administered debit card, to spend all but pennies of his father's benefits each month, for his personal use. (RP 1020, 1238-39).

C. JURY INSTRUCTIONS

Following Jury Selection and prior to Opening Statement, the court provided the following oral instructions to the jury regarding the procedure to be followed during and after the trial:

Finally, you will be taken to the jury room by the bailiff where you will select a presiding juror. The presiding juror will provide [*sic*] over your discussions of the case, which are called deliberations. You will then deliberate in order to reach a decision, which is called a verdict.

Until you are in the jury room for those deliberations, you must not discuss the case with the other jurors or with anyone else or remain

within the hearing of anyone discussing it. No discussion also means no emailing, text messaging, blogging, or any other forms of electronic communications.

....

You must not discuss your notes with anyone or show your notes to anyone until you begin deliberating on your verdict. This includes other jurors.

....

Until you are dismissed at the end of this trial, you must avoid outside sources, such as newspapers, magazines, blogs, the Internet...If you become aware of outside information, you must privately notify court staff. Do not discuss these matters with other jurors.

....

If you communicate with others in violation of my orders – and these are orders – you could be fined or held in contempt of Court.

(RP 185-86, 189-91, 192).

Throughout the course of the trial, the court continuously admonished the jury to not discuss the case prior to deliberations. For example, the court said:

So I'm going to release you for the evening. I'll remind you of the Court's orders and obligations regarding not discussing the case with anyone, including amongst each other and among family, friends, et cetera.

(RP 270).

You're in recess for the evening. I'll remind you of the Court's orders and obligations not to discuss the case among yourselves or at home...

(RP 555).

Remember the Court's instructions and orders regarding not discussing the case with each other or with anyone else...

(RP 667-68).

Do not discuss the case among yourselves, among anyone else...very important to preserve the integrity of the trial process.

(RP 775-76).

Remember, no talking about the case until it's submitted for deliberation. See you in the morning.

(RP 1555).

The defendant never objected to any of the trial court's admonishments to the jury regarding jury deliberation and he never requested any additional admonishments.

At the close of the trial, the court provided the following written instruction to the jury:

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

(CP 65, Instruction No. 2).

The court also read Instruction No. 2 orally to the jury before the jury retired to deliberate. (RP 1625). Prior to giving these instructions,

the court reviewed all proposed instructions outside the jury's presence, with counsel and the defendant. (RP 1576-1609). The defendant had no objection to Instruction No. 2, stating: "I don't have any issue with that, Your Honor." (RP 1577). Further, the defendant did not propose any alternative or additional instruction regarding jury deliberations.

ARGUMENT

I. The court should decline review of the defendant's first assignment of error because the defendant failed to preserve this issue for review.

In his first assignment of error, the defendant claims he was deprived of a fair trial and of unanimous jury verdicts because the trial court failed to instruct the jury that deliberations must include all twelve jurors at all times. *See* Brief of Appellant (hereafter, "Brief") at 3. The court should decline review.

A defendant must object to an alleged error at the time of trial in order to preserve the issue for review. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). A defendant properly objects to an alleged error at the time of trial by apprising the trial court of the precise points of law involved and the reasons upon which error has occurred. *State v. Bailey*, 114 Wn.2d 340, 345, 787 P.2d 1378 (1990).

RAP 2.5(a) generally precludes a defendant from raising an issue for the first time on appeal. *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009). An exception to the rule requiring issue preservation applies only if the defendant can demonstrate manifest error affecting a constitutional right. RAP 2.5(a)(3); *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988). The constitutional error exception “is not intended to afford criminal defendants a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below.’” *Scott*, 110 Wn.2d at 687 (quoting *State v. Valladares*, 31 Wn. App. 63, 76, 639 P.2d 813 (1982), *rev'd in part on other grounds*, 99 Wn.2d 663, 664 P.2d 508 (1983)). Rather, in order to demonstrate “constitutional” error, the defendant must identify a constitutional right that was implicated. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). In order to demonstrate “manifest” error, the claimant must show he was “actually prejudiced” by the constitutional error. *Gordon*, 172 Wn.2d at 676. The focus of the analysis is on whether the error is so obvious on the record as to warrant appellate review. *State v. O'Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009). An appellant can demonstrate actual prejudice only if he or she “can make a plausible showing that the asserted error had practical and identifiable consequences at the trial”. *State v. Irby*, 187 Wn. App. 183, 193, 347 P.3d 1103 (2015) (citing *Gordon*, at 676). “If the facts

necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.” *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Here, the defendant never objected to the court’s instructions or admonitions regarding jury deliberations. Additionally, the defendant never requested (and was denied) additional instructions or admonitions on jury deliberations. Consequently, the defendant waived this alleged error because he failed to preserve it for review.

The defendant has failed to demonstrate manifest error affecting a constitutional right, which can be reviewed for the first time on appeal. First, there is no evidence in the record that the court failed to provide the jury with the proper instructions on jury deliberations. The court’s oral instructions to the jury, which were given following Jury Selection and prior to Opening Statements, were a verbatim recitation of WPIC 1.01 - “Advance Oral Instruction - Beginning of Proceedings.” 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 1.01 (4th Ed). The court’s written Instruction No. 2, which was provided to the jury, at the close of trial and prior to jury deliberations, was a verbatim recitation of WPIC 1.04 - “Jurors’ Duty to Consult with One Another.” 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 1.04 (4th Ed). WPIC 1.01 and WPIC 1.04 are the only approved General Instructions on deliberations as provided by the

Washington Supreme Court Committee on Jury Instructions. 11 Wash. Prac., Pattern Jury Instr. Crim. Highlights (October 2016 Update) (stating the “Pattern Jury Instructions—Criminal provides Washington's only source of official criminal jury instructions”).

In addition, contrary to the defendant’s assertion, the court is not required to provide WPIC 4.61, which admonishes the jury to not discuss the case prior to deliberations, prior to every recess. *Brief*, at 9. Rather, in the “Notes on Use” section for WPIC 4.61, the Committee states:

Give this oral admonition to the jury at the time of the first recess, and at subsequent recesses *as appropriate*. The jury will already have been advised of these matters in greater detail by WPIC 1.01 (Advance Oral Instruction—Beginning of Proceedings).

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 4.61 (4th Ed) (emphasis added). The court followed this instruction. Further, in WPIC 4.60, the Committee states that instructions (such as WPIC 4.61) need only be given if the lawyers request them. 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 4.60 (4th Ed). No such request was made by the attorneys.

There is no evidence in the record that the jury disregarded the court’s proper instructions on deliberations. Furthermore, the defendant does not claim there is evidence in the record that the jury disregarded the court’s instructions. Rather, the defendant merely engages in wild speculation that, because the jury reached its verdicts in less than five

hours, there is a “reasonable probability that to speed up the process” the presiding juror divided the jury in to groups, each assigned to decide certain charges; or, there is “very likely a scenario” that members of the jury continued to deliberate while at least one juror left to use the bathroom, because the court never instructed them to *not* do this. *Brief*, at 12-13. There is absolutely no evidence in the record to support either of the defendant’s theories.

Lastly, the cases to which the defendant cites are inapposite. In *State v. Lamar*, 180 Wn.2d 576, 579, 327 P.3d 46 (2014), the trial court replaced an indisposed juror with an alternate juror after deliberations had commenced and then told the original jurors that they should bring the new juror “up to speed” as to what had already occurred and deliberate from there. *Lamar*, 180 Wn.2d at 579. In *State v. Fisch*, 22 Wn. App. 381, 382, 588 P.2d 1389 (1979), the defendant was tried as a co-defendant with his mother. The jury reached verdicts as to the defendant’s charges; however, before it reached verdicts on his mother’s charges, one juror fell ill. *Id.* Here, no jurors were ever replaced with alternates and no jurors ever fell ill. *Lamar* and *Fisch* have no bearing in this case.

There is no evidence in the record that the jury was improperly instructed or that it deliberated in a manner that was improper. Consequently, facts necessary to adjudicate the defendant’s claimed error

are not in the record on appeal, the defendant cannot show actual prejudice, and his claimed error is not manifest. Therefore, this assignment of error has been waived and the court must decline review.¹

II. The trial court's failure to enter written findings of fact and conclusion of law pursuant to CrR 3.5(c) was harmless.

The defendant argues that the trial court erred when it failed to enter written findings of fact and conclusions of law, pursuant to CrR 3.5, after it held a hearing on the admissibility of the defendant's statements to law enforcement. *Brief*, at 14. The defendant argues that the appropriate remedy is to remand this case to the trial court for entry of written findings and conclusions. *Brief*, at 15. The State concedes that the trial court erred when it failed to enter written findings of fact and conclusions of law, pursuant to CrR 3.5(c); however, the error is harmless because trial court's oral findings are sufficient to permit appellate review.

CrR 3.5(c) provides the court must state in writing: "(1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor." CrR 3.5(c). However, "failure to enter findings required

¹ It is worth noting that appellate counsel raised the exact same claim of error for the first time on appeal in *State v. Tucker, Jr.*, 196 Wn. App. 1041, WL 6236890 (WA. Ct. App. Oct. 25, 1016). The appellate court declined review. *State v. Tucker* is an unpublished opinion, it has no precedential value, is not binding, and is cited only for such persuasive value as the court deems appropriate. GR 14.1.

by CrR 3.5 is considered harmless error if the court's oral findings are sufficient to permit appellate review." *State v. Cunningham*, 116 Wn. App. 219, 226, 65 P.3d 325 (2003) (citing *State v. Smith*, 67 Wn. App. 81, 87, 834 P.2d 26 (1992)), *aff'd*, 123 Wn.2d 51, 864 P.2d 1371 (1993).

The court conducted a CrR 3.5 hearing with Clark County Sheriff's Office Sergeant Anthony Barnes and with Clark County Sheriff's Office Detective Kevin Harper. (RP 194, 332). Sgt. Barnes spoke to the defendant on October 7, 2013. (RP 333). Det. Harper spoke to the defendant on October 7, 2013, and on May 29, 2014. (RP 194-95).

Both Sgt. Barnes and Det. Harper testified that, on October 7, 2013, they spoke to the defendant at the defendant's home; the defendant was never restrained in any way; the defendant was never told he was not free to leave; the defendant never asked to leave; the defendant was never made any threats or promises; and both officers were conducting preliminary investigations when they spoke to the defendant, at best. (RP 198, 200, 201-02, 333, 335). No testimony was offered in contradiction of either officer's testimony.

The only issue for the court to determine regarding the defendant's communications with law enforcement on October 7, 2013, was whether the defendant was in "custody", such that *Miranda* warnings were required. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2D

694 (1966). “A defendant is in custody for the purposes of *Miranda* when his or her freedom of action is curtailed to a ‘degree associated with a formal arrest.’” *State v. Solomon*, 114 Wn. App. 781, 787, 60 P.3d 1215 (2002) (quoting *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983)). The court concluded the defendant’s statements to both officers were admissible because there was neither an actual nor a constructive custody or arrest before law enforcement spoke to the defendant on October 13. (RP 338, 211).

Regarding the defendant’s statements to Det. Harper on May 29, 2014, Det. Harper testified that he advised the defendant of his *Miranda* warnings pursuant to his State-issued card; the defendant was not confused; no threats or promises were made; and the defendant agreed to talk to Det. Harper. (RP 203-04). No testimony was offered in contradiction of Det. Harper’s testimony.

The only issue for the court to determine here was whether the *Miranda* warnings that were given to the defendant reasonably conveyed his rights to him and whether his statements were voluntary. *Florida v. Powell*, 599 U.S. 50, 130 S. Ct. 1195, 1203, 175 L. Ed. 2d 1009 (2010); see *State v. Vannoy*, 25 Wn. App. 464, 467, 610 P.2d 380 (1980). The trial court concluded the defendant’s statements were admissible because

the appropriate warnings were given to the defendant to meet both federal and state constitutional protections. (RP 212).

Both the undisputed facts and the trial court's conclusions from the CrR 3.5 hearings are clear in the record and are sufficiently clear to allow appellate review. Additionally, the defendant cites to no authority to support his proposition that this case should be remanded to the trial court for entry of written findings and conclusions and he makes no argument that either the undisputed facts or the trial court's oral rulings are unclear. Therefore, this court should find the trial court's error was harmless and that remand to the trial court for entry of written findings and conclusions is unnecessary.

CONCLUSION

The defendant's convictions should be affirmed. The defendant's convictions for each special verdict should also be affirmed.

DATED this _____ day of January, 2016.

Respectfully submitted:

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CORRECTED BRIEF OF RESPONDENT

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